

Outside Counsel Conflicts of Interest

These procedures apply to all requests for waivers of Outside Counsel conflicts of interest submitted to the Outside Counsel Conflicts Committee. Every Outside Counsel is expected to follow these procedures pursuant to its Legal Services Agreement (LSA) with the Legal Division. These procedures do not provide Outside Counsel with any right to due process or right to a waiver.

Authority of the Conflicts Committee and Regional Counsel to Resolve Conflicts of Interest

The Legal Division has established a Conflicts Committee which, under delegated authority from the General Counsel, has the authority to resolve Outside Counsel conflicts of interest and issues arising under the "Contractor Conflicts of Interest Regulations," 61 Fed. Reg. 9590 (March 11, 1996), to be codified at 12 C.F.R. Part 366 ("Contractor Regulations"), as they relate to law firms and sole practitioner lawyers providing services to the FDIC. Generally, requests for waivers of conflicts of interest may be granted or denied on behalf of the FDIC only by the Conflicts Committee, the General Counsel, or the Chairman of the FDIC.

Reporting Conflicts of Interest

1. During the Application Process

Outside Counsel desiring to perform work for the FDIC must meet minimum standards of competence, experience, integrity, and fitness for contractors, as specified in the Contractor Regulations. As part of the application process for an LSA, Outside Counsel must provide information concerning actual or potential conflicts of interest and matters that may present the appearance of a conflict. Each initial or renewal application should be referred to the appropriate Conflicts Coordinator for review of the Outside Counsel's conflicts disclosures. Disclosures of conflicts made during the application or renewal process should be referred to the Conflicts Committee for resolution prior to final approval or rejection of the application, unless the office or section does not intend to execute an LSA with the firm for reasons other than those concerning conflicts of interest. In such cases, a waiver request need not be submitted, unless Outside Counsel was inherited and continues to perform work for the FDIC on inherited matters.

Under the Contractor Regulations, if Outside Counsel discovers a conflict of interest after submitting its application but prior to LSA execution, it must disclose the matter to the FDIC in writing within 10 days; however, the Legal Division expects matters of a sensitive or high profile nature to be disclosed immediately upon discovery.

Reporting Conflicts of Interest (cont.)

2. After Retention

After Outside Counsel has executed an LSA, it has the continuing responsibility to monitor and report in writing any actual or potential conflict of interest or appearance of a conflict, regardless of whether it is representing the FDIC on active matters at the time of discovery. Under the Contractor Regulations, conflicts of interest that arise when Outside Counsel contemplates representation of a client adverse to the FDIC or are discovered during the course of representation of another client must be disclosed in writing to the FDIC within 10 days of discovery; however, the Legal Division expects matters of a sensitive or high profile nature to be disclosed immediately upon discovery.

Conflicts of interest must be submitted to the Conflicts Committee for resolution even if the Legal Division office or section recommends denying the waiver request.

3. Failure to Disclose Conflicts or Comply with Policies

Failure to make full and timely disclosure of actual or potential conflicts of interest, or matters that may present the appearance of a conflict, as well as failure to comply with FDIC conflicts of interest policies and procedures are extremely serious matters. Such failures may subject Outside Counsel to corrective action including but not limited to:

- a letter of reprimand
- refusal to waive a conflict
- suspension of new referrals
- rejection or reduction of fee bills
- withdrawal of all pending matters
- termination of legal services
- imposition of a bar to application
- denial of an LSA
- referral to the appropriate state licensing authorities
- civil or criminal actions (in appropriate cases.)

It is solely within the discretion of the Legal Division to determine whether or not a conflict of interest exists. Even the appearance of a conflict may result in the denial of a waiver or other appropriate actions. In the event that matters are transferred pursuant to the corrective actions listed above, Outside Counsel is expected to follow FDIC policies and procedures and to cooperate fully in the orderly transfer of such matters.

Procedures for Requesting Waivers of Conflicts of Interest

To obtain a waiver of an actual or potential conflict of interest, or appearance of such, Outside Counsel must submit a written request to the designated Conflicts Coordinator at the Legal Division office or section with which the Outside Counsel negotiated its LSA or, if that office has closed, the office assuming the responsibilities of the closed office. Outside Counsel lacking an LSA should direct a written request to the Conflicts Coordinator in the FDIC office or section having geographic jurisdiction over the firm's principal office. Outside Counsel should not send waiver requests directly to the Conflicts Group or the Conflicts Committee; waiver requests will only be considered when accompanied by the written recommendation of the appropriate Conflicts Coordinator with the concurrence of the office's Regional Counsel or section's Assistant General Counsel.

Outside Counsel's waiver request (or the Conflicts Coordinator's recommendation, absent such request) should detail, where pertinent:

- the nature of the conflict of interest
- the parties and financial institutions involved
- the office responsible for the financial institution out of which the conflict of interest arises
- the nature of the work that has been and/or currently is being performed for the FDIC
- the financial institutions (or subsidiaries or servicers) for which work has been or currently is being performed on behalf of the FDIC
- the FDIC Oversight Attorney(s) involved in the conflict
- any other relevant considerations suggested by the Statement of Policies.

The Conflicts Coordinator will:

- review Outside Counsel's disclosure and/or request
- consult with the FDIC Oversight Attorney(s) involved in the adverse matter
- coordinate the formulation of a recommendation to the Conflicts Committee.

The Conflicts Coordinator is responsible for the completion of all documentation for the Conflicts Committee, which should include a copy of Outside Counsel's disclosure or waiver request, the recommendation of the FDIC Oversight Attorney, a conflicts tracking system form, and the Conflicts Coordinator's recommendation for resolution of the conflict with concurrence by the office's Regional Counsel or section's Assistant General Counsel.

Procedures for Requesting Waivers of Conflicts of Interest (cont.)

The Conflicts Committee may exercise broad discretion when a conflict of interest is discovered without disclosure by Outside Counsel. If determined by the Conflicts Committee to be appropriate, however, the Conflicts Coordinator may notify Outside Counsel in writing of the discovery and allow counsel a specified period of time to address the issue in writing. If no response is received within the specified period, the Conflicts Coordinator will refer the matter to the Conflicts Committee without Outside Counsel input.

Meetings of the Conflicts Committee are not public proceedings. Appearances before the Conflicts Committee by Outside Counsel are not allowed. Contacts with individual members of the Conflicts Committee by Outside Counsel are strongly discouraged. Questions from Outside Counsel concerning pending waiver requests should be directed to the Conflicts Coordinator or the Conflicts Group in the Outside Counsel Unit.

Determinations by the Conflicts Committee

1. Expedited Processing of Waiver Requests

The Conflicts Committee will consider a waiver request on an expedited basis for good cause shown. Good cause can be shown, for example, when a trial date, court, or bid deadline is imminent, or when a client, potential client, or an employee of Outside Counsel will be materially prejudiced by a delay in resolution of the conflict of interest. The Conflicts Coordinator will make the initial determination as to whether to recommend expedited processing of a request for waiver and will forward the request to the Conflicts Group. A brief written justification for expedited treatment must be incorporated into the documentation. If expedited processing is granted, facsimile copies of the waiver request will be accepted, provided original documents are later provided to the Conflicts Group. The Conflicts Committee will resolve expedited requests as quickly as possible. The Conflicts Group will notify Outside Counsel and the Conflicts Coordinator of the decision via facsimile followed by a confirmation letter to the Outside Counsel.

2. Reconsideration of Conflicts Committee Decisions

The Conflicts Committee will entertain requests for reconsideration of its decisions when submitted by the appropriate Conflicts Coordinator and upon showing good cause. Good cause is generally shown by demonstrating the availability of new and significant information or changed circumstances.

Terminations and Suspensions

1. Conflicts Committee Action

If the Conflicts Committee determines that termination of Outside Counsel's legal services is appropriate, matters must promptly be transferred to other counsel or to an in-house attorney within 45 days of the decision, unless an exception is justified.

Requests for exceptions to terminations to permit Outside Counsel to continue representation of the FDIC on particular matters will be considered on a case-by-case basis upon the request of the Oversight Attorney. These requests must be in essentially the same form as a waiver request submission and must demonstrate that good cause exists to justify an exception.

Factors considered typically include:

- availability of other experienced counsel in the geographic area
- pending deadlines and the likelihood of replacement counsel's becoming sufficiently knowledgeable to pursue the matter effectively
- cost of developing applicable expertise in replacement counsel
- degree of prejudice to the FDIC.

2. Lawsuits Against Outside Counsel

Initiation of suit by the FDIC against Outside Counsel creates a conflict of interest requiring that no new referrals be made and that pending cases be reassigned to other counsel or to an in-house attorney. The Professional Liability Section of the FDIC distributes a monthly list of lawsuits against Outside Counsel. Notifications to staff and requests for exceptions follow the procedure described in the preceding subsection.

Distribution of Conflicts Committee Decisions

The Conflicts Group will promptly notify each Outside Counsel in writing of the Conflicts Committee's decisions. Notification letters describe any conditions or corrective actions imposed by the Conflicts Committee and are delivered to the firm by Certified Mail, Return Receipt Requested. The letter states that "The decision of the Committee is effective upon receipt of this letter." Receipt is evidenced by the return of the Certified Mail Receipt.

Conflict waiver requests and determinations are confidential and are not to be communicated to anyone outside the FDIC, except the Outside Counsel affected by the determination or as necessary in litigation or other matters after approval by the Conflicts Committee. Redacted versions of Decision Memoranda are available to the public in the FDIC Reading Room.